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No. 93-813

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ATTORNEY GENERAL OF TEXAS, *et al.*,
PETITIONERS,

v.

JUDGE F. HAROLD ENTZ, *et al.*,
RESPONDENTS.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGE ENTZ'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Court of Appeals properly refused to permit some of the parties, by their agreement, to block consideration of the merits of the appeals independently perfected by Judge Entz and Judge Wood?

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Respondent Dallas County District Judge F. Harold Entz ("Judge Entz") opposes Petitioner Texas Attorney General Dan Morales' Cross-Petition for Writ of Certiorari for the following reasons:

STATEMENT OF THE CASE

Judge Entz adopts the factual background provided in his opposition to petition for writ of certiorari in the related Cause No. 93-630, "*League of United Latin American Citizens, et al., v. Attorney General of Texas, et al.*" Judge Entz relies upon the opinion of the en banc majority of the Fifth Circuit for the balance of the factual background.

REASONS FOR DENYING THE WRIT

Judge Entz is relieved to find himself finally in this proceeding opposite the "versus" from the Attorney General of Texas. The Attorney General ("General Morales") has cross-petitioned for certiorari on the same ground raised by question 3 of petitioners in Cause No. 93-630, i.e., the propriety of the Fifth Circuit's refusal to dismiss Judge Entz's and Judge Wood's appeals on the joint motion to remand of petitioners and General Morales. Accordingly, Judge Entz adopts his opposition to that petition on that issue for this response. General Morales has raised a few additional arguments in his cross-petition to which Judge Entz must briefly reply here.

General Morales argues to this Court that the Fifth Circuit should have let him surrender rather than reach the merits and let him "win." The quotation marks are justified because, as evidenced by his cross-petition, General Morales does not consider the result below to be a win and does not want to win this lawsuit for the State of Texas; he wants to reach a political result consistent with his partisan affiliation. General Morales surely does not believe that the procedural issue regarding the motion to remand merits this Court's plenary consideration; it is just an avenue to reach the political result that he desires. Thus General Morales tries to persuade this Court that the anomalous procedural issue that arose below is a threat to the polity that this Court should address; in so doing he sets up several straw persons that Judge Entz must now knock down.

I. THE DENIAL OF REMAND DOES NOT FORCE THE STATE TO LITIGATE

General Morales tells this Court that the result below will mean that no Voting Rights Act case will ever be settled and that state defendants will be required to litigate to the final motion for rehearing, because any disgruntled voter can force the state defendants to continue fighting. That admittedly troubling specter evanesces for two reasons.

First, no one is forcing General Morales to fight. Judge Entz does not try to force General Morales to defend this case. Indeed, Judge Entz wishes that General Morales had stepped to the sidelines and taken a seat on the opposing team's bench long ago, rather than obstructing the field of play. Nor does the Fifth Circuit's ruling require General Morales to do anything; that is vividly illustrated by his "Response" to petitioners in No. 93-630, in which he simply took no position on the merits. This is the true point on which General Morales could have cited to *Local No. 93, International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528-29 (1986) ("It has never been supposed that one party . . . could preclude other parties from settling their own disputes and thereby withdrawing from litigation.").

While Judge Entz does not claim the right to force General Morales to litigate, Judge Entz does claim the converse right that General Morales cannot by his agreement prevent Judge Entz from prosecuting his independently perfected appeal. As this Court stated in *Local 93*: "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third

party . . . . A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Id.* at 529.

The reason the Union could not prevent the settlement in *Local 93* is that the settlement did not affect the rights of the Union: "The decree imposed no legal duties or obligations on Local 93." *Id.* at 511. Rather than taking potential promotion slots away from Local 93 members, the settlement created additional promotion slots available to minority plaintiff class members; it did not divide the pie differently, instead it created a bigger pie. *Id.* at 508-10. Thus, approving the consent decree did not affect the rights of the Union and "the District Court's retention of jurisdiction leaves it open for [the Union] to press whatever other claims it might have before that court." *Id.* at 513 n.5. The Union and the plaintiffs in *Local 93* were not adverse because the plaintiffs were not trying to take anything away from the Union and the Union likewise "failed to assert any legal claims" against the plaintiffs. *Id.* at 511.

The situation here is just the opposite; plaintiffs are trying to take away the electoral system in which Judge Entz participates, both as a judge and as a voter; likewise, Judge Entz is defending that system against plaintiffs' attacks. In that context, the lesson of *Local 93* is that Judge Entz cannot require General Morales to continue his appeal, but General Morales cannot by his agreement dismiss Judge Entz's appeal.

Second, General Morales' "endless litigation" specter fails because it does not distinguish between voters and intervenors. Judge Entz does not claim that any disgruntled voter could block General Morales from surrendering; rather, he claims that an intervening party defendant is entitled to continue an independently perfected appeal. The distinction between a voter and an intervenor is significant. A putative intervenor may not intervene of right if his or her interest is already adequately represented and may not intervene permissively if it would disrupt the litigation. *E.g.*, 7C CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §§ 1909, 1913, 1922 (1986). Thus, the problems General Morales conjures are easily managed at the front end when intervention is sought, rather than by overruling *Local 93* and permitting one party to dismiss another party's appeal. *Cf. Matter of First Colonial Corp.*, 544 F.2d 1291, 1298 (5th Cir. 1977) (order granting intervention can limit right of appeal).

General Morales did not oppose or seek to limit Judge Entz's personal capacity intervention at the time and apparently regrets that lapse. General Morales now essentially tries to strike Judge Entz's intervention; that effort is both too late and in the wrong court. With unintended irony, General Morales observes that "civil rights actions are to be treated no differently than other civil actions in terms of settlement." Cross-Petition at 5. While acknowledging that principle, General Morales wishes this Court to honor it in the breach and permit General Morales and plaintiffs to arrogate to themselves the power to undo Judge Entz's intervention and dismiss

his appeal. In any other civil action, such a procedural gambit would be rejected out of hand.

II. JUDGE ENTZ HAD STANDING

General Morales claims that the Fifth Circuit's decision to permit Judge Entz to continue his appeal was wrong because Judge Entz had no standing to object to the proposed "settlement." That argument is flawed in at least two respects.

First, General Morales claims that because the proposed settlement would leave Judge Entz running for election county wide, he has no standing to object to the remand. That puts the cart before the horse. Judge Entz's standing to appeal is not determined by a hypothetical remedy that might be imposed on remand, but rather by the complaint asserted by plaintiffs and the order entered by the trial court. Plaintiffs certainly complained that Judge Entz's election was illegal and sought relief that would affect Judge Entz's bench; the district court found that Judge Entz's election was illegal and ordered an interim remedy that would have affected Judge Entz's bench. Given that, Judge Entz as an intervenor defendant had standing to appeal from that order, he did so, and he has prosecuted that appeal to the Fifth Circuit, the Supreme Court, the Fifth Circuit again, and now again before this Court. Judge Entz's standing to appeal is determined by whether the order from which the appeal is taken adversely affects Judge Entz — and it undisputedly did — not by whether a potential remedy would leave him running county wide.

General Morales wrongly conflates the issues pertinent to the remedial phase of voting rights litigation with those pertinent to the liability phase. Cross-Petition at 6. Admittedly, once there is a final determination of liability, the local government has the right in the first instance to propose a remedy. *Wise v. Lipscomb*, 437 U.S. 535 (1978). Nothing in that opinion or in the underlying policy suggests that an intervening defendant does not have standing to contest a finding of liability because the remedy a local government would propose — if liability were ultimately sustained — would leave the intervening defendant's job intact.

Second, as the Fifth Circuit noted, "the proponents of remand view the judges' intervention too narrowly . . . ." App. 20a. Judge Entz did not limit his motion to intervene to his interest in running county wide in Dallas County; rather, he moved in his personal capacity to intervene generally as a defendant due to his interest as a sitting judge, as a lawyer and participant in the judicial system, and as a voter. Without limiting the scope geographically or occupationally, the district court granted the motion.[1] It blinks reality to say that all of those

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[1] Although Judge Entz directed his factual arguments primarily towards Dallas County, his legal arguments were never so restricted. After General Morales purported to "settle" the appeal, Judge Entz argued to the Fifth Circuit that the scope of his original intervention was sufficiently broad that he could defend all counties under attack. In the alternative, he moved to broaden the scope of his intervention to include the defense of the other counties. The Fifth Circuit determined that the intervention originally was broad enough to cover all counties under

interests are left unaffected if the trial level judiciary of the State of Texas is demolished and rebuilt with an isolated bench or two left untouched. If nothing else, Judge Entz certainly has an interest as a voter in voting for the judges for Dallas County.

General Morales again confuses the issue by claiming that while Judge Entz had standing as a voter to object to remand regarding Dallas County, the Fifth Circuit erred in letting Judge Entz and Judge Wood block the remand and so-called settlement for counties other than Dallas and Harris County. But Plaintiffs and General Morales never asked for a remand for the seven undefended counties alone. Had plaintiffs not sued regarding Dallas County, Judge Entz's ability to intervene might have been altered; had the district court not found liability and entered a remedial order for Dallas County, Judge Entz's ability to appeal might have been altered; and had General Morales and plaintiffs reached an agreement that did not affect Dallas County and moved to remand only with respect to other counties while permitting Judge Entz's appeal on Dallas County to go forward, Judge Entz's ability to oppose the motion to remand might have been altered. None of those things happened, however. At every stage of this proceeding — from the complaint, to the district court's order, to the purported settlement and motion to remand — Dallas County and Judge Entz have been under attack. Judge Entz has a right to oppose the motion to remand and defend himself and his interests

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attack and thus did not need to address the motion to broaden Judge Entz's intervention. App. 21a n.14.

from that attack. General Morales cannot take away that right by reciting a litany of "could haves" that never happened.[2]

CONCLUSION

Judge Entz respectfully requests this Court to deny General Morales' cross-petition for writ of certiorari.

Respectfully submitted,

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[2] Judge Entz does not concede that General Morales could have settled the appeal with respect to the other counties over Judge Entz's objection, *see supra* note 1, but only notes now that General Morales never attempted that.